

State Personnel Board, State of Colorado

Case No. 98 B 034

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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PENNY LAMPMAN,

Complainant,

v.

DEPT. OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, MOUNT  
VIEW YOUTH SERVICES CENTER,

Respondent.

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This matter was convened on November 26, 1997 and hearing on this matter was held June 22, 1998 through June 25, 1998 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, B-65, 1525 Sherman Street, Denver, CO 80203.

**MATTER APPEALED**

Penny Lampman, Complainant ("Complainant" or "Lampman"), appeals the disciplinary termination of her employment as an Accounting Technician II at Mount View Youth Services Center ("Respondent" or "Mount View").

Complainant's failure to fulfill her job responsibilities are actions for which corrective or disciplinary action may be imposed BUT the disciplinary termination was NOT within the range of reasonable alternatives available to the appointing authority and the discipline imposed was in violation of Board Rule R8-3-1, 4 CCR 801-1. Thus, Respondent's actions were arbitrary and capricious or contrary to rule or law. Pursuant to R8-3-4, 4 CCR 801-1, suspension for 135 days is applicable in imposing discipline upon Complainant.

**PRELIMINARY MATTERS**

Respondent was represented by Thomas S. Parchman, Assistant Attorney General, State Services Section, 1525 Sherman Street, 5<sup>th</sup> Floor, Denver, CO. Complainant was represented by Frank Zlogar, Attorney at Law, 1380 Lawrence Street, Suite 300, Denver, CO 80204.

At the hearing on June 22, 1998, Complainant withdrew any claims as to the appropriateness of the delegation of appointing authority.

## **1. Procedural History**

Complainant filed her Notice of Appeal on October 10, 1997. Subsequent to an extension of time for filing prehearing statements, prehearing statements were filed on November 11, 1997. This matter was commenced, via telephone, on November 26, 1997 and additional time to complete discovery was provided by the Board.

On January 23, 1998, the parties entered into a stipulated protective order which provided that identifying information pertaining to any youth housed by Respondent shall be kept confidential.

After another continuance because of medical necessity, the matter was reconvened on June 22, 1998 through June 25, 1998.

## **2. Witnesses**

Respondent called the following witnesses during its case-in-chief:

Jonathan Hough	Assistant Director Mount View Youth Services Center
Yasmine Browning	State Services Trainee V Mount View Youth Services Center
Esther Gonzales	Administrative Assistant III Mount View Youth Services Center
Barbara Ellsworth	Program Accountant North Central Accounting District Division of Youth Corrections
Damien Behounek	Unit Manager North Central Accounting District Division of Youth Corrections
Serafin Diaz	Accountant North Central Accounting District Division of Youth Corrections
Sandy Kline	Accounting Technician IV North Central Accounting Office Division of Youth Corrections
Joyce Tomanek	Chief Financial Officer North Central Accounting Office

Penny Brown

Division of Youth Corrections  
Director  
Mount View Youth Services Center

On rebuttal, Respondent called the following witnesses: Barbara Ellsworth; Sandy Kline; Paula Sullivan, office manager for DYC program, and Penny Brown.

Complainant called the following witnesses:

Roger Johnson	Director of Marvin W. Foote Service Center
	Division of Youth Corrections
Robert Weller	Storekeeper
	Mount View Youth Services Center
Naomi Bartel	Program Assistant I
	Lookout Mtn. Youth Services Center
Dean Lawyer	Systems Engineer
	Microtech Tel
Penny Lampman	Complainant

### **3. Exhibits**

The following exhibits of Respondent were entered into evidence without objection: Exhibits 1 - 4, 6 - 19 (with offers of proof re: portions of exhibits), 21, 22 (with the exception of 3<sup>rd</sup> paragraph), 23 - 25, 26 (with the exception of notes on page 1), 27, 28 (with the exception of notes on page 1), 29 - 34, 35 (with the exception of the unidentified handwriting), 36, 38 - 48, 50 - 52, 54, 56 - 62, 65, 68 - 69, 73, 75 - 77, and 80.

Respondent's Exhibit 37 was admitted over objection Respondent's Exhibits 20, 49, 53, 55, 63 - 64, 66 - 67, 70 - 72, 74, and 78 were not admitted.

At the time of hearing, the ALJ reserved ruling on the admission of Respondent's Exhibit 5 as a result of unidentified handwriting appearing on the exhibit. Exhibit 5 is not admitted at this time as being cumulative.

The following exhibits of Complainant were admitted into evidence without objection: A, B-1 through B-9, D, E, J, K, M-1, M-2 was admitted on limited basis, M-3, N, and O.

Complainant's Exhibits C-1 through C-5, F-1 through F-5, G-1 through G-10, H-1 through H-2, I, and L were not offered or admitted into evidence.

## **ISSUES**

1. Whether the Complainant engaged in the actions for which discipline was imposed;
2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority, including whether or not Respondent violated State Personnel Board Rule R8-3-1 in imposing a level of discipline;
3. Whether Complainant has failed to mitigate damages, or in the alternative, whether Respondent should be entitled to offset against any back pay awarded to Complainant any amounts earned by or awarded to Complainant.
4. Whether attorney fees and costs should be awarded to either party pursuant to section 24-50-125.5, C.R.S.

## **FINDINGS OF FACT**

### **I. Background**

#### **A. Mount View Youth Services Center**

1. Mount View Youth is a detention facility which holds juveniles on behalf of the Department of Human Services. The campus of Mount View consists of various buildings including at least two dedicated to administrative services.
2. In the course of holding juveniles and maintaining the facility, Mount View incurs various expenses, including expenses associated with telephones, office supplies, cellular telephones, fire alarms, and voice-mail systems.
3. Mount View also receives checks payable to Mount View representing rebates and/or credits from various vendors. Said checks are to be deposited and copies forwarded to the North Central Account Office ("NCAO") timely in order to provide accurate budget tracking.
4. Subsequent to the Summer of 1996, Mount View would directly receive invoices from vendors, such as U.S.West, AirTouch Cellular, and Faisson Office Supplies, for services provided. It would also receive checks, rebates and funds on behalf of juveniles.

5. Upon receipt, the invoices were to be forwarded to NCAO, through interdepartmental mail, in order to be appropriately processed and paid. During Complainant's tenure at Mount View, mail delivery was inconsistent. At various times, information, in the form of support documentation for accounting transactions and copies of invoices, would have to be re-sent because they would never be received by an addressee.
6. When juveniles are transferred to Mount View, the facility takes custody of the possessions of the juveniles, including any money or valuables. The possessions are held in trust on behalf of each juvenile.
7. Department of Human Services, Office of Youth Services Policy 2.4 - Juvenile Trust Funds, effective July 1, 1993, provides for juvenile trust funds and that such shall be established and controlled using the Colorado Fiscal Rules. Policy 2.4 is applicable to the Mount View facility. It provides, in part, that *monthly* reporting of all transactions shall be provided to the division of accounting and copies of all pertinent financial information shall be provided. (Exhibit 2).
8. Department of Human Services, Office of Youth Services Policy 2.5 - Juveniles' Personal Funds, effective July 1, 1993, provides that all moneys in the possession of a juvenile at the time of admission to a facility shall be held in custody by the facility. Funds are to be deposited in the student trust bank account. A monthly accounting report is to be generated by the assigned record keeper of all transactions posted to the student banking system. Such report is to be submitted by the fifth of every month. (Exhibit 2).
9. In May 1996, the North Central Accounting Office, Office of Operations, Division of Accounting, issued "Policies and Procedures - Trust Funds and Student Accounts."
10. During the time in question, Mount View used an electronic bookkeeping system to track the funds being held in trust for juveniles. In particular, Mount View utilized a system known as HIMS. Upon the arrival of a juvenile, an account within HIMS would be established, any funds in the possession of the juvenile would be held in trust with a corresponding credit being made to that juvenile's account on HIMS and, then, the money would be placed in what equates to a student trust account. Correspondingly, whenever a juvenile's funds held in trust were expended on behalf of the juvenile, a debit would have to be made to that juvenile's HIMS account. Upon a juvenile being released from Mount View, HIMS would be used to determine the balance held on behalf of that juvenile and the interest accrued. Upon a determination of the amount, the juvenile, or the juvenile's legal guardian, would be entitled to those funds.

11. Penny Brown ("Brown") was the Director of the Mount View Youth Services Center and the appointing authority for Complainant. Brown became Director in November 1996. Brown replaced Roger Johnson, the former Director of Mount View.
12. As Director, Brown was responsible for overseeing Mount View, including matters related to personnel, programs, budget, and property on the campus.

## **B. Complainant**

13. Lampman began working for the State of Colorado in 1981 as a Accounting Technician 1B at the Fort Logan facility. On or around 1983, Lampman transferred from Ft. Logan to Mount View and, in 1984, was upgraded to an Accounting Technician II. At the time of her termination, Lampman was an Accounting Technician II.
14. As an Accounting Technician II, Complainant's initial PC-8/Job Description provided she was to: administer trust funds, maintain a complete banking system for all funds, prepare statements of cash receipt forms and bank deposits, provide monthly totals of student accounts to the accountant for balancing in the DYS Banking system, file all support items for all transactions and maintain these files in comprehensive order, track students released from facility in order to clear accounts, examine fiscal records, and administer various trust funds for programs, maintain a complete set of subledgers for students that receive social security checks, petty cash, sale and recordkeeping of meal tickets, help with female residents during intake into facility, and be campus liaison for all computer locations and phone locations. (Exhibit A).
15. Lampman's responsibilities did not substantially change upon a Position Description Questionnaire being completed on September 15, 1993. (Exhibit 77). The PDQ provides that Lampman was to be familiar with DYC (formerly DYS) policies and procedures. The PDQ further provides that the most important services of the position were to maintain the accounts of petty cash, student accounts, the Mount View Trust Fund, and to act as facility liaison.
16. Lampman's actual responsibilities comported with the PC-8 and the PDQ and included: ordering office supplies for the facility, processing invoices and other fiscal matters, administering the student trust funds and updating the HIMS system, processing purchase orders, being computer and phone system liaison for the Mount View campus, distributing staff mail and facilitating distribution of residents' mail, and custodian of petty cash.

17. During 1996 and 1997, Complainant received direction to move her office from one administration building to another. Said move occurred in Spring 1997, subsequent to an office being made available. Upon moving offices, Complainant found that the previous occupant had left some materials, including a rolling filing cabinet in the office. In addition, some materials, including loose papers, were left in unlabeled boxes.
18. Complainant's performance, as rated through various Performance Planning and Appraisal forms was as follows:

Date	Overall Rating	Applicable Comments; Planning/Appraisal (if any)
7/1/88 to 6/30/89	Above Standard	None
7/89 to 7/90	Commendable	None
7/1/90 to 6/30/91	Commendable	None
7/91 to 6/92	Commendable	None
7/1/92 to 6/30/93	Commendable	<b>From Interim Progress Review (3/93)</b> <b>Management:</b> usually very good, esp. relating to money and computer liaison. <b>Supervisor/Human Management:</b> Needs Improvement, must learn to resolve personnel issues in a manner which does not close doors to people or staff. <b>Planning, Organizing:</b> good <b>Organizational Commitment:</b> Good to commendable <b>Communications:</b> Needs Improvement: stop spreading rumors, stop relaying information through 2 <sup>nd</sup> and 3 <sup>rd</sup> parties. <b>Interpersonal Relations:</b> Needs Improvement <b>Comments:</b> Need to service "our" needs first, not other divisions.
7/1/93 to 6/30/94	Commendable	<i>Plan lists responsibility of Facility Liaison.</i>
7/1/94 to 6/30/95	Commendable	None.
7/1/95 to 6/30/96	Commendable	<b>General Comments:</b> Concerned about work day and working a full 8 hours.
1/24/97 to 6/30/97	Needs Improvement	Lampman disagreed with the evaluation; A corrective action was issued with this evaluation.

(Exhibits B-1 through B-9).

19. Complainant received a corrective action in May 1988 related to, in part, mixing cash receipts and trust fund cash accounts in violation of DYS procedures; failure

to balance and reconcile the accounts as required by procedures; failure to follow established procedures, the general condition of student accounts being poor and numerous recording errors having been found, and failure to adequately correct these issues in a reasonable amount of time. Complainant signed this corrective action under protest. (Exhibit 42).

20. On January 27, 1994, Complainant received a corrective action from Roger Johnson which provided, in part, that Complainant was to: (1) develop a comprehensive accounting procedure regarding recording cash; (2) keep books and corresponding cash updated at all times and to utilize the safe in Complainant's office; (3) maintain weekly records and reports; (4) and post trust fund expenditures and receipts weekly. (Exhibit O). The corrective action also provided that if these actions were successfully completed, the corrective action UPON REQUEST would be removed from Complainant's personnel file.
21. Complainant never requested that the corrective action be removed. Johnson still rated Complainant commendable on her evaluation for this period of time. Johnson maintains that had he been asked, he would have *considered* removing the corrective action in 1995.

## **II. Incidents in 1997**

### **A. Unpaid Invoices**

22. In January 1997, Barbara Ellsworth of NCAO corresponded to Brown, via e-mail, expressing concern about: (1) 16 unpaid invoices from Faisson Office Supplies dating back to January 1996; and (2) a phone bill from U.S. West for \$13,879.23 for the period June 1996 through November 1996. Ellsworth contemporaneously forwarded copies of the invoices to Complainant for expedited processing and return.
23. Subsequently, Ellsworth requested that the original Faisson invoices be sent to her office. Said invoices should have been in Complainant's possession. (Exhibit 15).
24. Ellsworth obtained documentation from U.S. West indicating that there was an unpaid balance on phone bills. However, Ellsworth's office never received the original invoices for amounts due which was to be forwarded by Complainant.
25. Complainant 's primary explanation for Ellsworth and NCAO not receiving the original invoices timely is that they were lost in interdepartmental mail.



26. Mount View also received invoices from AirTouch Cellular dated January, October, and December 1996. (Exhibits 28 - 30, as admitted). The January invoice is labeled from equipment sales and reflects that it is for one cellular phone with one identifiable number. The invoices for October and December reflect charges incurred on the same cellular phone. The phone was transferred to personnel at another DYC facility around the same time. Sandy Kline eventually paid the bill after an investigation.
27. At least one cellular phone was stolen and payments for charges incurred were to be stayed until the service was appropriately terminated.

#### **B. Credits**

28. In May 1997, Ellsworth communicated to Complainant that her office had not received any credits as normally provided by the phone companies or copiers for the months of March and April. Ellsworth further indicated, via email, that in order to reconcile the reimbursements from the various vendors, she would need specific information, including the names of vendors who had provided credits, the amounts of the credits, etc. (Exhibits 8-10).
29. On June 16, 1997, Ellsworth still had not obtained the requested information from Lampman.
30. On June 17, 1997, Complainant committed to sending the requested information. (Exhibit 11-12). Ellsworth communicated that it was imperative to receive the information as soon as possible since the close of the fiscal year occurred on June 30, 1997.
31. As of June 24, 1997, Complainant had failed to provide the information to Ellsworth.

#### **C. Audit**

32. In March 1996, an audit was conducted by the NCAO of the Mount View facility and its Student Banking system. Serafin Diaz ("Diaz") and Damien Behounek ("Behounek") were responsible for conducting the audit. The audit consisted of Diaz conducting preliminary work at his office, and then visiting the facility. Subsequently, an Audit Report was produced in approximately 2 weeks. A draft of the Audit Report was circulated to Lampman and Brown and a meeting was held between the auditors, Lampman, and Brown. Lampman and Brown discussed the recommendations with the auditors and provided comments.

33. The recommendations and comments/responses can be summarized, in part, as follows:

**RECOMMENDATION**

**COMMENT BY MOUNTVIEW**

All juveniles' money shall be deposited to the bank and a corresponding student account shall be set-up in HIMS Banking System.

All parties agreed that system, as kept, was in violation of NYC Policies and Procedures. All parties agreed that this policy should be reviewed given that some juveniles are in custody less than 30 days and that establishing a HIMS account for such is not productive.

Per NYC Policies & Procedures, withdrawal receipts MUST be signed and authorized before juvenile's & trust funds moneys are released.

Agree with the comment. We will change the procedure on withdrawals in such a way to have signed approvals.

Each juvenile must have their own interest-bearing account set-up in HIMS.

Agreed with comment.

RE: Following NYC Guidelines and Procedures on Trust Fund and Student Accounts: Mount View should ensure that employees follow the guidelines and procedures on Trust Fund and Student accounts. Trust Fund and Student Accounts withdrawals are NOT entered every month, student balances are not correct (causing overpayment or underpayment), accounts are not closed at time of student departure causing interest not to be distributed or properly accrued.

Agree with comments. Designate that deposits will be made at least 1/week; proper signatures on cash/check disbursements; HIMS entries done weekly; all transaction entered weekly.

(Exhibit 6).

34. During the audit process, and in responding to the audit's comments, Complainant participated by (1) facilitating the production of information to the auditors; (2) meeting with the auditors; and (3) participating in meetings with auditors in discussing and agreeing to recommendations/responses based on the draft Audit Report.
35. A final Audit Report was produced which incorporated the comments and responses of Lampman and Brown. The final Audit Report of Mount View was discussed with the auditors, Barbara Ellsworth, Behounek, Brown, and the director of the department at a meeting at Ft. Logan. Complainant was not in attendance.

#### **D. DYC Policy Compliance**

36. In April, Diaz sent email to Complainant requesting that the support for transactions in the Student Banking system for January, February, and March had not been received. At this time, he advised Complainant that such constitutes a failure to timely provide support information in compliance with DYC policies. (Exhibit 2,18).
37. Again, Complainant's primary explanation for such support information not being provided was the failure of interdepartmental mail.

#### **E. Disbursement of Student Funds and Upkeep of Student Funds**

38. During Complainant's tenure at Mount View, some student funds were held in labeled envelopes. Said funds were to either be deposited or kept in the safe located at Mount View.
39. After Complainant's termination, envelopes were discovered in Complainant's office which were labeled with student names, were not always located in the safe, and which contents did not match the labeled amounts. (Exhibit 22, 26). No documentation was located to provide an explanation for these envelopes.
40. Funds existed in student accounts which should have been distributed to students when they were released from the facility. While distribution of such funds can be difficult because the students/juveniles are difficult to track subsequent to their departure from the facility, no documentation or accounting trail was left to explain why such funds could not be returned. Interest accrues on those undistributed funds.
41. Un-mailed letters to juveniles from other juveniles were found in Complainant's office that had not been mailed or forwarded despite being one or two years old. Again, written explanation could not be found to justify, or even explain, the presence of such correspondence.

### **III. Corrective and Disciplinary Actions**

42. On June 5, 1997, Complainant received a corrective action after having completed an R8-3-3 meeting on May 23, 1997. Complainant's counsel had provided a 5 page response outlining the purported reasons for Complainant's actions, addressing: the need to deposit cash receipts timely, to correctly allocated student funds to the Student Trust Fund account, approval and

authorization of trust fund transactions, crediting interest to juvenile accounts, and gaining approval for expenses. (Exhibit E).

43. Complainant maintained that there were reasonable explanations for the problems cited including the interdepartmental mail, the previous supervisor's, Roger Johnson's, business practices, the problem associated with juveniles who are only in the facility for a brief period of time, and situations with particular juveniles which were anomalies and not normal.
44. Nevertheless, the corrective action was taken based upon incidents discovered in the **audit** performed by NCAO. (Exhibit 42). The corrective action provided, in part, that Complainant:
  - a) Comply with DYC policies 2.4 and 2.5, the Guidelines and Procedures for Office of Youth Services Facilities Trust Fund and Student accounts.
  - b) Update the HIMS system monthly.
  - c) Submit phone bills to P. Brown on a quarterly basis and assure that contractors are current on payment.
  - d) Send all checks that are credits for Mount View's operating expenses to accounts/Payable immediately upon receipt or when they total more than \$100.00
  - e) Keep records updated at all times and organize her office to ensure quick access to records.
45. The corrective procedures outlined above were to be *effective immediately*. The corrective action provided that failing to follow the corrective procedures could result in additional corrective action and/or discipline including termination.
46. Complainant was on sick leave from approximately July 7, 1997 to the time of her termination in September, 1997.
47. While on leave, various members of the staff attempted to fulfill Complainant's responsibilities. In so doing, Complainant's office was used by a variety of individuals including Brown and Esther Gonzales. At such time, there was confusion and miscommunication between Brown, Gonzales, and Lampman in attempts to retrieve passwords, safe combinations, etc.
48. Brown, in attempting to fulfill Complainant's duties, noted that Complainant's

office was not kept organized, had a deficit of documentation and files given the responsibilities of the position, and was generally unkempt with papers not being appropriately labeled or filed. It was in this period, Brown discovered old unopened invoices, stale checks, unsecured student funds, and unsecured checks.

49. Brown documented the physical condition of the office by having Roger Johnson, Complainant's previous supervisor, take photographs of the office. (Exhibits 52, 54, 56-62, 65, 68-69 73, 75-76). In addition, Brown contacted the Chief Financial Officer for NCAO, Joyce Tomanek. Tomanek toured the office and provided guidance as to how to improve the organization of the office and how to segregate the disorganized files, invoices, and receipts in order that Brown could timely and properly conduct the tasks associated with Complainant's position. Tomanek's remarks reflected concern about the state's fiduciary obligations being met given the disorganization.
50. On August 18, 1997, while on leave, Brown sent Complainant correspondence stating that Brown was convening another R8-3-3 disciplinary meeting in order to determine whether additional disciplinary action was necessary based on Complainant's failure to adequately perform the functions of her position to include not depositing checks in a timely manner, failure to forward invoices sent for payment, failure to protect and handle cash, and inadequate documentation.
51. It was eventually agreed that the R8-3-3 meeting would be conducted pursuant to R8-3-3(D)(2) and that Complainant could present information regarding the reasons for not implementing disciplinary action and any mitigating circumstances associated with the purported acts. (Exhibit 50).
52. On September 23, 1997, Complainant was terminated by Brown for:
  - a) Failure to comply with standards of efficient service or competence;
  - b) Willful misconduct to include but not limited to, either a violation of the State Personnel Board rules or the rules of the agency; and
  - c) Willful failure or inability to perform duties as assigned.
53. Brown noted that Complainant failed to be meticulous in handling youth's money and the accounts of the campus, failed to return money timely to youth upon their departure from the facility, and failure to timely process invoices received.

54. Subsequent to Complainant's departure, and the use of a temporary worker, Yasmine Browning, as a trainee, fulfilled Complainant's responsibilities. Browning was able to organize the office and complete a majority of Complainant's responsibilities successfully.

## **DISCUSSION**

### **I. INTRODUCTION**

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994 ).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses.

### **II. PARTIES' ARGUMENTS**

Respondent argues that Complainant did not have too many duties and that her responsibilities had not substantially changed over the years. Thus, any argument that

Complainant was too inundated with tasks to be able to complete any of them appropriately is without merit. Respondent maintains this is demonstrated by the fact that other individuals were able to successfully perform her tasks in Complainant's absence. Respondent maintains that Complainant had notice of her performance problems and that such notice occurred over the course of her career, given the fact that she received two corrective actions associated with accounting practices. Respondent argues that as the photographic exhibits and testimony of Brown, Johnson, Tomanek demonstrate, Complainant was disorganized, failed to appropriately process invoices and credits, and failed to maintain student accounts. This is reinforced, according to Respondent, by the incidents which occurred in 1997.

Complainant argues that Respondent has failed to meet its burden of proof in showing that Complainant had engaged in the acts for which discipline was imposed. Complainant first argues that she has a work history with the State of almost 16 years and that the action of termination was based on 4 months of performance under a new appointing authority. Complainant maintains Respondent should have considered Complainant's entire employment record and that if that had been done, termination would not have been the correct discipline to be imposed. Complainant supports this argument by citing the PACE evaluations and the fact that despite being given a corrective action, the appointing authority still rated her as commendable. Complainant further argues that more than anything else, circumstance explains the various failures of Complainant and that it is not a performance problem. For instance, Complainant (1) moved into an office which had not been completely cleaned out, causing the appearance of disorganization; (2) that interdepartmental mail caused delays in the forwarding of documentation to NCAO; and (3) that Complainant's various responsibilities became overly burdensome, including her computer and phone liaison work. Finally, Complainant argues that given the corrective action issued in June, 1997, and the fact that she went on sick leave on or about July 7, 1997, she was not given an opportunity to fulfill the mandates of the corrective action. Complainant maintains that she did not violate R8-3-3 vis-à-vis her performance and that she should be reinstated. Complainant requests recovery for an improper personnel action.

### **III. Complainant Engaged in the Actions for which Discipline was Imposed**

Respondent amply demonstrated, and provided substantial evidence, that Complainant engaged in the acts for which discipline was imposed. The incidents which occurred in 1997 amply demonstrate that Complainant was not fulfilling her job responsibilities.

The communications from Ellsworth clearly show that Complainant was not processing invoices correctly or timely. Invoices for office supplies were not being

forwarded to NCAO. Such had not been done for up to a year. In fact, invoices were not even being collected. Yet, it was one of Complainant's job duties to be responsible for office supplies and to forward invoices for such supplies as appropriate. Complainant admits not even receiving the invoices after delivery despite it being her responsibility. Further, Complainant failed to timely process invoices from U.S. West. This is made clear by the fact that the amounts past due on the U.S. West invoice suggest that months of service had not been paid. Moreover, Complainant was never able to provide the original invoices to NCAO for a period of 6 or 7 months. While it is reasonable to conclude that some of those invoices may have been lost in interdepartmental mail, it is inconceivable that they were lost each month for six or seven months.

With regard to the AirTouch Cellular bills, some issues exist as to whether or not the bills that were past due were the result of inaction by Complainant. Respondent failed to meet its burden with regard to these invoices. Personnel assigned to one particular phone were transferred to another facility while Complainant was still receiving the invoices for that phone. It is reasonable that confusion could occur as to who was responsible for paying such invoices, especially if processing the invoice meant providing a facility specific code, such as an accounting string. The same can be said for any cellular phones that were stolen.

Respondent has met its burden in demonstrating that Complainant failed to timely process credits and moneys received on behalf of Mount View. Clearly, credits or rebates were received from vendors on a monthly basis as acknowledged by Ellsworth. Yet, the accounting information for such was not timely forwarded to the NCAO. In fact, Complainant indicates she would forward the appropriate documentation but that documentation was never received. One can only wonder whether or not copies of the documentation were ever kept, as would be appropriate, in order that copies be forwarded in the event information was lost.

The testimony of Diaz that Complainant failed to timely forward support information for the Student Trust Funds cannot be ignored. It is not the fact that some information was not provided timely which is persuasive. Rather, the fact that Diaz had to repeatedly ask for information over an extended period of time is indicative of Complainant's failure. Complainant was an Accounting Technician II for a number of years and knew or should have known of the need to collect, copy, and provide support information. The instances with Diaz demonstrate that no documentation was collected, copied to support the transactions, or timely forwarded to NCAO.

The physical condition of Complainant's office, and the conclusions which can be drawn therefrom, also allow Respondent to meet its burden. As demonstrated, documents were not filed, there were insufficient files to account for the types and



numbers of invoices flowing through that position. Items were not labeled or sorted. No documentation was found to explain why certain invoices had not been paid, why some had not been opened, etc. To some extent, the disorganization of the office can be attributed to Complainant having moved office locations in the Spring of 1997. However, the documentation supports that even the support documentation that was current, as opposed to documentation not being used on any regular basis and being stored in boxes, was disorganized. Also, while there might be merit to the argument that Complainant “inherited” a number of documents from the previous office occupant, such an excuse cannot be used to account for the failure to collect timely and process pending invoices.

The issue of maintaining HIMS and accounting for the Student Banking Trust account is somewhat troubling and Respondent clearly met its burden. Testimony was elicited from witnesses indicating that maintaining such accounting, using HIMS, was not excessively difficult or time consuming. Yet, Complainant failed to provide HIMS reports timely and documentation demonstrates that weekly reconciliation reports were not completed timely, pursuant to Complainant’s job responsibilities. Nor was such information timely forwarded to NCAO.

Respondent has further demonstrated that Complainant committed acts for which discipline was imposed as evidenced by the audit. The Audit Report, the comments and responses solicited therewith, and the testimony of the auditors amply shows that the recommendations of the audit were justified and that the business practices audited were within the job responsibilities of Complainant. Complainant participated in responding to the audit recommendations and had notice of the need to improve the outlined business practices.

It is clear that Complainant failed to comply with DHS ’s policies 2.4 and 2.5. These policies were applicable to Mount View and articulated the responsibilities of each institution regarding Juvenile Trust Funds and Juvenile Personal Funds. Complainant was responsible for fulfilling these policies. However, timely reports were not filed. Support documentation was not provided to NCAO. Funds held in trust were not distributed to juveniles timely, or in the alternative, explanations were not documented as to why funds were not distributed.

#### **IV. The Disciplinary Action Imposed was in Violation of Board Rule R8-3-1**

Given that Complainant engaged in the acts for which discipline imposed, the next issue to be addressed is whether or not the disciplinary termination was within the range of reasonable alternatives available to the appointing authority. The disciplinary

action of termination was imposed based on Complainant's inability to account for youth's money, failure to handle the accounts on campus, failure to deposit checks, and failure to timely process invoices received.

The grounds for the discipline of termination were substantially the same as the majority of the grounds for the corrective action. In addition, the acts which warranted discipline occurred, for the most part, prior to the issuance of the corrective action but were discovered subsequent to the corrective action. The 1997 corrective action stated that the actions to be corrected had to occur immediately. Complainant left on sick leave on July 7, 1997. Complainant was given, in effect 30 calendar days, and fewer working days, to comply with the corrective action. Yet, the corrective action itself provided that certain items were to be done monthly or quarterly. Complainant was not given a chance to comply with **all** of the terms of the corrective action. In other words, based on the language of the corrective action, Complainant had at least a month, if not 3 months, to comply with portions of the corrective action. At the same time, it is clear that Complainant was not complying with portions of the corrective action, such as keeping records updated at all times and organizing her office to ensure quick access. Complainant failed to comply with portions of the corrective action but was not given a full opportunity to comply with all of its terms. Under this scenario, it would **not** be arbitrary and capricious to impose additional discipline, *less termination*, because it would be clear that Complainant was failing to meet portions of the terms of the corrective action. Board Rule R8-3-3(B), 4 CCR 801-1, allows for the concurrent application of disciplinary actions and corrective actions. But, such discipline would have to be imposed within the context of R8-3-1 and progressive discipline.

In determining the level of discipline to be imposed, a number of elements must be considered. State Personnel Board Rule R8-3-1, 4 CCR 801-1 encourages progressive discipline. The rule provides that the decision to correct or discipline an employee shall be governed by (1) the nature, extent, seriousness and effect of the act, error or omission committed; (2) the type and frequency of the previous undesirable behavior; (3) the period of time that has elapsed since a prior offensive act; (4) the previous performance evaluation of the employee; (5) an assessment of information obtained from the employee; (6) any mitigating circumstances; and (7) the necessity of impartiality in relations with employees. The rule further states that unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action. The imposition of the level of discipline is also a matter to be determined by the appointing authority and the appointing authority is presumed to make such decisions regularly and appropriately. See: *Chiappe v. State Personnel Board*, 622 P.2d 527, 532-533 (Colo. 1981), *State Personnel Board v. District Court In and For City and County of Denver*, 637 P.2d 333 (Colo. 1981).

In applying this rule of progressive discipline, the seriousness and effect of complainant's acts must be considered. The incidents in 1997, given the Complainant's position, were serious. Complainant was failing to fulfill general Accounting Technician II duties. Yet, the impact of such acts is less serious. While Complainant's failures regarding paying invoices caused more work for NCAO, and threatened the ability of Mount View to maintain some of its services, no serious harm actually occurred. The only other harm which occurred was in the form of interest incorrectly accruing on behalf of juveniles and juveniles not timely receiving funds. With regard to the frequency of the Complainant's failures, in light of Complainant's performance evaluations, and the time within which any previous corrective actions occurred, it cannot be said that the behavior occurred at a rate of high frequency. The performance evaluations, even with a corrective action, were positive. Finally, in reviewing mitigating circumstances, one cannot ignore that Complainant was given little time to improve her performance and correct her previous performance issues. Given the elements outlined above, Complainant successfully rebuts the presumption that the appointing authority made the decision to impose disciplinary termination appropriately. State Personnel Board Rule R8-3-1 mandates that progressive discipline should have been imposed. For Respondent to impose discipline in the form of termination, given these competing elements and prior to completion of the time frame for complying with the corrective action, was arbitrary and capricious and/or contrary to rule or law.

## **V. Mitigation of Damages and Recovery for Improper Personnel Action**

Given the findings of fact that Complainant engaged in acts for which discipline was imposed, it cannot be concluded that the personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless.

## **CONCLUSIONS OF LAW**

1. Complainant engaged in the actions for which discipline was imposed.
2. The disciplinary *termination* was not within the range of reasonable alternatives available to the appointing authority given the facts that: (1) the corrective action of 1997 embodies the acts for which the disciplinary termination was imposed, and that Complainant was not given ample time to correct her behavior; and (2) Respondent did not implement R8-3-1. **Suspension**, without pay, pursuant to R8-3-4, 4 CCR 801, is applicable in that findings are made which justify the imposition of a disciplinary action.
3. Neither party is entitled to an award of attorney fees or costs in this matter.

## **ORDER**

1. Complainant is to be reinstated to her position as Accounting Technician II.
2. Complainant is to be awarded back pay and benefits, offset by: (1) any disability benefits she may have received due to her sick leave and related disability as provided by law, (2) any income she has earned subsequent to her termination, and (3) a period of suspension without pay of 135 days.

Dated this \_\_\_\_<sup>th</sup> day  
of August, 1998  
at Denver, Colorado

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G. Charles Robertson  
Administrative Law Judge

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetta v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

## **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

## **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing

Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

**CERTIFICATE OF MAILING**

This is to certify that on this 6<sup>th</sup> day of August, 1998, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Frank Zlogar, Esq.  
1380 Lawrence Street, #300  
Denver, CO 80204

and in the interagency mail, addressed as follows:

Thomas S. Parchman  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203

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